

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATIONIN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 8982-s76LJ BY
VICTOR A. BISTONFINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 1, 1977, by the hearing examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 0.004 cubic foot per second or 2 gallons per minute of water and not to exceed 3.2 acre-feet of water per annum for fish and wildlife purposes and 0.2 acre-foot of water per annum for stock-watering purposes, constituting a total of 3.4 acre-feet of water per annum from Patrick Creek by means of a gravity flow pipe at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 27 North, Range 21 West, N.P.M., and impounded in a new 2-acre-foot reservoir located at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 6; to be used for fish, wildlife, and stock-watering purposes from January 1 to December 31, inclusive, of each year.
2. The Provisional Permit is granted subject and junior to all valid prior existing water rights in the source of supply, including, but not necessarily limited to, the 300-miner's-inch water right of Objector William J. Kesler, as said right is delineated at Proposed Findings of Fact, paragraph 7, and Proposed Conclusions of Law, paragraph 5, of the Proposal for Decision.
3. The Applicant may not appropriate water for either consumptive nor nonconsumptive use at such times when to so appropriate will adversely affect any prior existing water right in the source of supply.
4. Specifically, the Applicant shall not divert water in any manner from Patrick Creek pursuant to this Provisional Permit at any time when Objector William J. Kesler does not have a full 300 miner's inches available for appropriation at the Objector's point of diversion on Patrick Creek.
5. The Applicant shall construct the proposed facilities in accordance with all pertinent Soil Conservation Service and Montana Department of Fish and Game regulations.

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6. The Applicant shall construct and maintain a headgate at the point of diversion so as to enable the complete shutting down of any and all diversion facilities from Patrick Creek, and shall further construct and maintain a return flow system from the pond back to Patrick Creek, so as to enable the full flow appropriated from Patrick Creek to return to Patrick Creek, and so as to further enable the complete emptying of the system back into Patrick Creek.

7. The Applicant shall construct and maintain all facilities so as to minimize all consumptive losses through seepage or evaporation, to a point reasonably consistent with the current state of the art technology.

8. The Applicant shall be required to fill the proposed facilities initially, or, should the need later arise, subsequently, only at times other than from April 1 to November 1, inclusive.

9. The Applicant shall install and maintain an adequate measuring device at the point of diversion, and a second adequate measuring device at the point of return to Patrick Creek, so as to enable the Applicant to keep a record of all quantities of water withdrawn from the source of supply and returned to the source of supply, as well as the periods of such withdrawal and return. Such records shall be presented to the Department for inspection upon demand by the Department.

10. The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

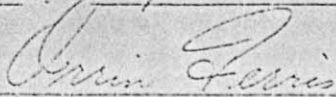
11. The granting of a Provisional Permit in no way guarantees that the Applicant will be able to exercise the Provisional Permit.

12. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a record of water used for their own proof of their water rights and use.

Done this 1st day of September, 1977.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 8982

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 8982-s76LJ BY VICTOR A. SISTOK)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on the objections to the above-described application for a new water right was held in the City Council Chambers of the Kalispell City Hall at Kalispell, Montana, on Wednesday, March 30, 1977, commencing at approximately 1:30 p.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Victor A. Sistok, appeared personally and presented testimony in support of the application.

The objector, William J. Kesler, appeared personally and presented evidence and testimony in support of his objection. The Objector was represented by counsel, James E. Vidal, Esq., of Kalispell, Montana.

EXHIBITS

At the hearing, the Objector offered into evidence ten (10) exhibits, to wit:

- a. A photograph depicting Patrick Creek at the Applicant's property.
- b. A photograph depicting Patrick Creek at the Applicant's property.
- c. An aerial photograph depicting certain ponds and irrigated fields on the Objector's property, as well as the location of the Applicant's proposed pond.
- d. A photograph depicting Patrick Creek at a point above the Applicant's property.
- e. A photograph depicting Patrick Creek at a point above the Applicant's property.

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- f. A photograph depicting Patrick Creek at a point above the Applicant's property.
- g. A photo depicting Patrick Creek on the Applicant's property.
- h. A photo depicting the Objector's diversion pond.
- i. A photograph depicting the quantity of water available for use by the Objector.
- j. A photograph depicting the Objector's irrigated fields.

Exhibits a, b, and d through j were all taken during the fall of 1976. All exhibits offered were admitted into evidence as Objector's exhibits a through j, respectively.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On June 18, 1976, the Department received Application for Beneficial Water Use Permit No. 8982-s76LJ from Victor A. Sistok, seeking to appropriate 0.004 cubic feet of water per second or 2 gallons of water per minute and not to exceed 3.2 acre-feet of water per annum for fish and wildlife purposes and 0.2 acre feet of water per annum for stockwatering purposes, constituting a total of 3.4 acre-feet per annum; to be appropriated from Patrick Creek, a tributary of Ashley Creek, in Flathead County, Montana; to be diverted from Patrick Creek by means of a gravity flow pipe at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 27 North, Range 21 West, of the Montana Principal Meridian; to be impounded in a new 2 acre-foot reservoir located at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 6; and to be used for fish, wildlife, and stockwatering purposes from January 1 to December 31, inclusive, of each year.

2. On September 21, 1976, the Department received an objection to the above-described application from William J. Kesler, alleging a prior filed appropriation on Patrick Creek dating from August 2, 1888 for 300 miner's inches, diverted from April 1 to November 1, and used during the same period for the irrigation of hay, grain and pasture. The Objector alleged that said water right is being fully utilized.

3. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant is proposing to construct a facility which will consist of a gravity flow pipe from the source of supply leading to a small kidney shaped reservoir located approximately 125 feet off the main stream, said reservoir to be of approximately 1/3 acre surface area, from 4 to 8 feet deep, with an earthen dam and overflow, with a valve system in the bottom to facilitate emptying, and having a return channel to Patrick Creek.

4. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant is proposing to construct a project which will flow from Patrick Creek, through the proposed facilities and return to Patrick Creek. It will consumptively use water from Patrick Creek only in the amount necessary to fill the structure initially, compensate for losses due to evaporation and seepage, and be consumed by stock.

5. For purposes herein, based upon testimony given at the hearing, it is found that at times, there is unappropriated water in the source of supply available for appropriation, and that such times occur only when there is both water in the source of supply in excess of all prior water rights in the source, and further when the diversion by the Applicant will not adversely affect any such prior existing water rights in the source.

6. For purposes herein, based upon testimony given at the hearing, it is found that if any provisional permit granted herein is conditioned to allow the appropriation

of water only at such times when there is unappropriated water in the source of supply available for appropriation, the rights of prior appropriators will not be adversely affected.

7. For purposes herein, based upon testimony given at the hearing, it is specifically found that the Objector, William J. Kesler is entitled to a prior water right to 300 miner's inches of water from Patrick Creek with a priority date of August 2, 1888, used for irrigation from April 1 to November 1, inclusive, of each year.

8. For purposes herein, based upon testimony given at the hearing, it is found that the proposed means of diversion and construction are adequate, provided all pertinent Soil Conservation Service and Montana Department of Fish and Game specifications are met.

9. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

10. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

11. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant does not propose to appropriate in excess of 15 cubic feet of water per second.

Based upon the above Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-830 and 889, R.C.M. 1947, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Provisional Permit No. 8982-s76LJ must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above Proposed Findings of Fact, and specifically based upon any conditions and limitations appearing therein, it is concluded that the criteria for the issuance of a Provisional Permit as delineated at 89-885, R.C.M. 1947 have been met.

4. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Provisional Permit. It is concluded that the rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

5. Specifically, it is concluded that the Patrick Creek water right of the Objector, William J. Kesler, as delineated in Proposed Findings of Fact Paragraph #7, above, must be protected and made senior to any right accorded by any Provisional Permit granted herein.

6. It is concluded that the issuing of a Provisional Permit in no way reduces the Applicant's liability for any damage caused by the Applicant's exercise of his Provisional Permit.

7. It is concluded that nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and upon the above Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 0.004 cubic feet of water per second or 2 gallons of water per minute and not to exceed 3.2 acre-feet of water per annum for fish and wildlife purposes and 0.2 acre-feet of water per annum for stockwatering purposes, constituting a total of 3.4 acre-feet of water per annum from Patrick Creek, a tributary of Ashley Creek, in Flathead County, Montana; to be diverted from Patrick Creek by means of a gravity flow pipe at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 27 North, Range 21 West, of the Montana Principal Meridian and impounded in a new 2 acre-foot reservoir located at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said section 6; to be used for fish, wildlife and stockwatering purposes from January 1 to December 31, inclusive of each year.

2. The Provisional Permit is granted subject and junior to all valid prior existing water rights in the source of supply, including but not necessarily limited to the 300 miner's inch water right of the Objector, William J. Kesler, as said right is delineated at Proposed Finding of Fact, Paragraph #7 and Proposed Conclusion of Law, Paragraph 5, above.

3. The Applicant may not appropriate water for either consumptive nor non-consumptive use at such times when to so appropriate will adversely affect any prior existing water right in the source of supply.

4. Specifically, the Applicant shall not divert water in any manner from Patrick Creek pursuant to this Provisional Permit at any time when the Objector, William J. Kesler, does not have a full 300 miner's inches available for appropriation at the Objector's point of diversion on Patrick Creek.

5. The Applicant shall construct the proposed facilities in accordance with all pertinent Soil Conservation Service and Montana Department of Fish and Game regulations.

6. The Applicant shall construct and maintain a headgate at the point of diversion so as to enable the complete shutting down of any and all diversion facilities from Patrick Creek, and shall further construct and maintain a return flow system from the pond back to Patrick Creek, so as to enable the full flow appropriated from Patrick Creek to return to Patrick Creek, and so as to further enable the complete emptying of the system back into Patrick Creek.

7. The Applicant shall construct and maintain all facilities so as to minimize all consumptive losses through seepage or evaporation, to a point reasonably consistent with the current state of the art technology.

8. The Applicant shall be required to fill the proposed facilities initially, or, should the need later arise, subsequently, only at times other than from April 1 to November 1, inclusive.

9. The Applicant shall install and maintain an adequate measuring device at the point of diversion, and a second adequate measuring device at the point of return to Patrick Creek, so as to enable the Applicant to keep a record of all quantities of water withdrawn from the source of supply and returned to the source of supply, as well as the periods of such withdrawal and return. Such records shall be presented to the Department for inspection upon demand by the Department.

10. The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

11. The granting of a Provisional Permit in no way guarantees that the Applicant will be able to exercise the Provisional Permit.

12. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

NOTICE

This is a Proposal for Decision and will not become final until accepted by the Administrator of the Water Resources Division, Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, must be filed with the Department within ten (10) days of service herein. Upon receipt of any written exception, opportunity will be provided to the Exceptor and to all adversely affected parties to file briefs and to make oral arguments before the Administrator of the Water Resources Division

DATED this 1st day of August, 1977.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER

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